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Adderina bt Kaharudin & Anor v Lim Yew Jin

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-621–04 OF 2023
SUPANG LIAN, LIM CHONG FONG AND ALWI ABDUL WAHAB JJCA
8 OCTOBER 2025

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Trusts and Trustees — Express trust — Certainties — Whether certainties of words, subject and object of trust had been shown — Whether trial court did not err in holding that a valid and enforceable express trust had been created

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The respondent ('Lim') had sued the appellant administrators of a deceased man's estate for a declaration that he was the beneficial owner of four pieces of land ('the lands') registered in the deceased's name and was entitled to receive the proceeds of sale of the lands. Lim's claim was based on a trust deed and an irrevocable power of attorney ('PA') which the deceased had executed in Lim's favour on 15 November 2010. On 18 January 2017, Lim had arranged for the deceased to sell three of the lands to third parties. However, 6 1/2 months later, the deceased died before the balance purchase price on the sales were fully paid. Lim filed the suit when the appellants denied his right to receive the proceeds of sale. In allowing Lim's claim, the High Court found from the evidence that Lim had paid for the acquisition of all the lands from a company and had registered them in the deceased's name to be held on trust for him (Lim). This history was reflected in the trust deed and PA. The instant appeal was against the High Court's decision.

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Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The evidence showed that at all material times an express trust existed between Lim and the deceased in terms of the trust deed and PA. The three certainties of words, subject and object of the trust had been shown. The trial court's decision in allowing Lim's claim was not plainly wrong to warrant appellate intervention (see para 23 & 25).

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(2) Given the unique advantage the trial court had in seeing and hearing the witnesses when assessing their credibility, there was no reason to disturb the findings of fact made by the trial judge (see paras 22–23).

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(3) With regard to the appellants' contention that the trust was not registered on the title deeds of the lands pursuant to s 344 of the National Land Code ('the NLC'), such registration was not mandatory because the

dominant purpose of s 344 of the NLC was to ensure that third-party interests were protected. In this case, there was no challenge from any third parties but merely a monetary claim by Lim on the sale of three of the lands based entirely on his relationship with the deceased as governed by the trust deed and PA (see para 24).

(4) With regard to the contention that the trust was illegal and void for being against public policy on the ground that the lands were Malay Reserve, the burden was on the appellants to prove that the lands were in fact Malay reservation land under the Malay Reservations Enactment (FMS Cap 142) and that the Enactment expressly prohibited or restricted dealings with non-Malays. The appellants had failed to discharge their burden of proof in this regard; hence their challenge on this ground could not be sustained (see paras 26 & 30–31).

[Bahasa Malaysia summary

Responden ('Lim') telah memfailkan tindakan terhadap para perayu selaku pentadbir harta pusaka si mati bagi mendapatkan suatu perisytiharan bahawa beliau merupakan pemilik berkepentingan kepada empat bidang tanah ('tanah-tanah tersebut') yang didaftarkan atas nama si mati, dan berhak menerima hasil jualan tanah-tanah tersebut. Tuntutan Lim adalah berasaskan satu surat ikatan amanah dan satu surat kuasa wakil tidak boleh batal ('PA') yang telah ditandatangani oleh si mati memihak kepada Lim pada 15 November 2010. Pada 18 Januari 2017, Lim telah menguruskan penjualan tiga daripada tanah tersebut kepada pihak ketiga. Namun demikian, enam setengah bulan kemudian, si mati telah meninggal dunia sebelum baki harga belian bagi urus niaga-urus niaga tersebut dibayar sepenuhnya. Lim memfailkan tindakan ini apabila para perayu menafikan haknya untuk menerima hasil jualan tersebut. Dalam membenarkan tuntutan Lim, Mahkamah Tinggi mendapati melalui keterangan bahawa Lim telah membiayai keseluruhan pemerolehan tanah-tanah tersebut daripada sebuah syarikat, dan telah mendaftarkannya atas nama si mati untuk dipegang secara amanah bagi pihaknya (Lim). Transaksi ini tercatat di surat ikatan amanah dan PA tersebut. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan, sebulat suara mengenepikan rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Keterangan menunjukkan bahawa pada setiap masa yang relevan, suatu amanah nyata wujud antara Lim dan si mati selaras dengan surat ikatan amanah dan PA tersebut. Tiga kepastian kata-kata, perkara dan tujuan amanah telah dibuktikan. Keputusan Mahkamah Bicara yang membenarkan tuntutan Lim tidaklah salah secara nyata sehingga memerlukan campur tangan mahkamah rayuan (lihat perenggan 23 & 25).

(2) Memandangkan kelebihan unik mahkamah bicara dalam melihat dan mendengar para saksi sewaktu menilai kebolehpercayaan mereka, tiada alasan untuk mengganggu dapatan fakta yang dibuat oleh hakim bicara (lihat perenggan 22–23).

(3) Mengenai hujahan para perayu bahawa amanah tersebut tidak didaftarkan pada hakmilik tanah-tanah berkenaan sebagaimana diperuntukkan di bawah s 344 Kanun Tanah Negara ('KTN'), pendaftaran sedemikian tidaklah mandatori kerana tujuan utama s 344 KTN adalah untuk memastikan kepentingan pihak ketiga dilindungi. Dalam kes ini, tiada cabaran daripada mana-mana pihak ketiga; yang wujud hanyalah tuntutan wang oleh Lim berhubung hasil jualan tiga bidang tanah tersebut, yang berasaskan sepenuhnya kepada hubungan beliau dengan si mati sebagaimana yang ditadbir oleh surat ikatan amanah dan PA (lihat perenggan 24).

(4) Mengenai hujahan bahawa amanah tersebut adalah menyalahi undang-undang dan terbatal atas alasan bercanggah dengan dasar awam kerana tanah-tanah tersebut adalah Tanah Rizab Melayu, beban adalah pada para perayu untuk membuktikan bahawa tanah-tanah tersebut sebenarnya merupakan tanah rizab Melayu di bawah Enakmen Rizab Melayu (FMS Cap 142) dan bahawa Enakmen tersebut secara jelas melarang atau mengehadkan urus niaga dengan bukan Melayu. Para perayu gagal memenuhi beban pembuktian tersebut; oleh itu cabaran mereka atas alasan ini tidak dapat dipertahankan (lihat perenggan 26 & 30–31).]

Cases referred to

Asia Capital Commodities Trade Sdn Bhd v The Owner of the Vessel 'Oriental Dragon' [2025] MLJU 2793; [2025] MLRAU 272, CA (refd)

Bebe Sakimah bt Mohd Asrof v Pendaftar Hakmilik Negeri Perak [2021] 7 MLJ 701; [2021] MLRH 700, HC (refd)

Chia Siew Hock v Chia Seow Gim & Anor [2021] 5 MLJ 51, CA (refd)

Hoo Ah Tee v PP [2013] 4 MLJ 636; [2013] 3 AMR 649, CA (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 1 MLRA 53, PC (refd)

Lim Yew Jin v Adderina bt Kaharudin & Anor [2024] MLJU 509; [2024] MLRHU 376, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Ooi Poh Ean & Anor v Lembaga Pembangunan Langkawi [2018] 2 MLJ 760; [2018] 1 MLRA 218, CA (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149; [2012] 1 LNS 1416, CA (refd)

Tuan Syed Azahari bin Noh Shahabudin & Anor v Ming Holdings (M) Sdn Bhd [2007] 4 MLJ 333, CA (refd)

Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614; [1994] 1 MLRA 226, SC (refd)

Legislation referred to

Evidence Act 1950 ss 31(1)(g), 65, 73A
Malay Reservations Enactment (Cap 142)
National Land Code s 344, 344(2)

Appeal from: *Lim Yew Jin v Adderina bt Kaharudin & Anor* [2024] MLJU 509 (High Court, Kuala Lumpur)

S Murthi (with Norzakiah Zainal bt Zainul) (S Murthi & Assoc) for the appellant.
Rabinder Singh (with Chu Chin Lee and Chew Tham Soon) (Rabinder Budiman & Assoc) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an appeal by the children who are beneficiaries and administrators of their deceased father estate resisting a claim by a third party on four pieces of land held by their father in trust for that third party.

[2] The appellants, who are individuals, were the defendants in the High Court and are the son and daughter of the late Dato' Kaharudin bin Mo Min ('deceased').

[3] The respondent who is also an individual was the plaintiff in the High Court.

[4] We heard the appeal on 16 May 2025 and thereafter adjourned our decision to deliberate on the arguments advanced by the parties.

[5] Now having done so, we give our decision below together with the supporting grounds thereto.

BACKGROUND

[6] The deceased was the registered proprietor of four properties situated in the District of Gombak, Selangor, namely:

(a) HS (M) 17963, No PT 29428, Batu 8 Jalan Ipoh, Mukim Batu, Daerah Gombak;

(b) HS (M) 17959, No PT 29424, Batu 8 Jalan Ipoh, Mukim Batu, Daerah Gombak;

(c) HS (M) 17961, No PT 29426, Batu 8 Jalan Ipoh, Mukim Batu, Daerah Gombak; and

(d) HS (M) 17997, No PT 29462, Batu 8 Jalan Ipoh, Mukim Batu, Daerah Gombak,
(collectively 'properties')

[7] On 16 January 2017, the deceased sold three of the properties to third-party purchasers, namely Dato' Yip Kum Fook and Tee Kim Teong, through arrangements made by the respondent.

[8] However, the deceased passed away on 1 August 2017 before the purchase price for the said three properties had been fully paid by the purchasers.

[9] Following the deceased's demise, the appellants, as administrators of his estate, refused to entertain the respondent's claim for payment of the outstanding balance of the purchase price from the purchasers.

[10] Consequently, the respondent commenced Kuala Lumpur High Court Civil Suit No WA-22NCVC-683–10 of 2018 ('the suit') against the appellants.

IN THE HIGH COURT

[11] The respondent claimed as follows in the High Court (in Bahasa Melayu):

10. Oleh yang demikian, Plaintif memohon untuk perintah-perintah seperti berikut:

(i) Satu deklarasi bahawa Plaintif adalah pemilik benefisial hartanah-hartanah berikut yang didaftarkan atas nama Kaharudin bin Mo Min (No. K/P: 381006–10–5009) (simati) menurut Surat Ikatan Amanah yang bertarikh 15.11.2010 dan Surat Kuasa Wakil Tidak Boleh Batal yang bertarikh 15.11.2010:

(a) Kesemua bahagian tanah yang dipegang di bawah HS (M) 17963, PT 29428, Mukim Batu, Daerah Gombak, Selangor;

(b) Kesemua bahagian tanah yang dipegang di bawah HS (M) 17959, PT29424, Mukim Batu, Daerah Gombak, Selangor;

(c) Kesemua bahagian tanah yang dipegang di bawah HS (M) 17961, PT 29426, Mukim Batu, Daerah Gombak, Selangor;

(d) Kesemua bahagian tanah yang dipegang di bawah HS (M) 17997, PT

29462, Mukim Batu, Daerah Gombak, Selangor.
(yang kesemuanya selepas ini dirujuk sebagai 'Hartanah-Hartanah tersebut').

(ii) Satu deklarasi bahawa Plaintif adalah berhak untuk menerima secara terus kesemua hasil jualan bagi Hartanah-Hartanah tersebut, termasuk baki harga belian di bawah 3 Perjanjian Jual-Beli yang kesemuanya bertarikh 16.1.2017 yang ditandatangani oleh Kaharudin bin Mo Min, sebagai penjual, bagi hartanah-hartanah yang dipegang di bawah HS (M) 17963, PT 29428, HS (M) 17959, PT 29424 dan HS (M) 17961, PT 29426, Mukim Batu, Daerah Gombak, Selangor dari pihak pembeli dan/atau peguamcara pihak pembeli;

(iii) Kos tindakan ini diperuntukkan; dan

(iv) Relif-relif lanjut atau lain seperti yang difikirkan patut dan wajar oleh Mahkamah yang Mulia ini.

which were denied by the appellants.

[12] After trial, the learned High Court judge decided wholly in favour of the respondent against the appellants with costs of RM40,000 subject to allocator ('judgment').

[13] The learned High Court judge held as follows in the grounds of judgment reported in *Lim Yew Jin v Adderina bt Kaharudin & Anor* [2024] MLJU 509; [2024] MLRHU 376:

[12] The plaintiff submitted that the trust deed, the PA, and the consent letters are validly binding on the deceased and his heirs and the plaintiff for mainly two reasons:

(a) the signatures of the deceased in the trust deed and the PA were duly witnessed by advocates and solicitors; and

(b) the trust deed and the PA were duly stamped and registered at the High Court of Malaya.

[13] According to the plaintiff's counsel, these indicated that the plaintiff had established that both the trust deed and PA were signed by the deceased and are thus binding on the defendants and all heirs of the deceased.

[14] The plaintiff's case is corroborated by a statutory declaration dated 2 October 2017 ('the SD') affirmed by PW4, who is an advocate and solicitor. The gist of the SD clearly stated that the signatures of the deceased and the plaintiff in respect of the trust deed and the PA were duly witnessed by PW4.

...

[19] Therefore, based on the evidence produced by the plaintiff, it can be concluded that the deceased had indeed executed the trust deed and the PA. These are all first-person primary evidence/testimonies which are all consistent, solid, sound,

and unimpeached. This in itself has established the plaintiff's case on the balance of probabilities. However, I shall also discuss the defendants' case to analyse the case in its totality.

...

[23] Based on the above authority, this court is of the view that unless the defendants could be able to prove that the deceased had involuntarily executed or had revoked the trust deed during his lifetime, the terms of the trust deed and the PA remain valid and binding. The defendants had failed to establish anything to this effect. Considering the oral and documentary evidence produced, the plaintiff had on the balance of probabilities proved to this court that the deceased had executed the trust deed and the PA on his own will. Hence, the trust deed and the PA are binding upon the defendants and remains in full force.

[24] The defendants then attacked the plaintiffs' claim by arguing that no original copy of the trust deed was tendered in court. It is an undeniable fact that the original copy of the trust deed was never produced before this court. The defendants insisted to invoke s 114(g) of the Evidence Act 1950 against the plaintiff for failing to produce the original of the trust deed.

[25] Counsel for the defendants had submitted that not only the trust deed, but also the PA and the consent letters ought not to be admitted as evidence and should accordingly be marked as an 'ID' documents for the maker of the documents, the deceased, is not here to attest as to their existence.

[26] The law on the admissibility of Part C documents is well settled. It is trite law that where a document is classified as a Part C document, the party adducing the document bears the evidential burden to satisfy the court on the balance of probabilities.

...

[28] Applying the conditions to our case herein, it is the finding of this court that the plaintiff's case falls under s 31(1)(g) of the Evidence Act. The reason being that the trust deed, the PA, and the consent letters were executed by the deceased in the presence of a witness (PW2) who had testified in court and had accordingly confirmed that the trust deed, PA, and the consent letters were indeed signed by the deceased. PW4 and PW6 had also confirmed that they had witnessed the deceased signing the trust deed and the PA. PW4 had then rendered her professional confirmation (a statutory declaration) to certify that she had witnessed the deceased signing these documents. All these had proven the plaintiff's claim on the balance of probabilities.

[29] Secondly, beside the declaration in the trust deed and the PA, the statements which were made by the deceased in the consent letters to assert his instruction to his solicitors to release all consideration sum of the properties to the plaintiff clearly further corroborated the existence of such arrangement between the plaintiff and the deceased.

[30] Also, the explanation given by PW6 about the loss of the original of the trust deed is sound and logical: the original trust deed was unable to be located due to the shifting from his former office.

[31] The plaintiff asserted that the photocopy trust deed should be admitted as

A evidence, as it fulfilled s 65 of the Evidence Act. The plaintiff relied on the recent High Court judgment of *Mohd Rafizi Ramli & Anor v Public Prosecutor* [2020] 12 MLJ 823; [2019] MLRHU 1589.

...

B [33] The defendants then relied heavily on the chemist report prepared by DW4 to prove their purported suspicion on the deceased's signature on the trust deed, the PA, and the consent letters.

[34] It is the defendants' argument that the signatures on the trust deed and the PA are not of the deceased. This prompted the defendants to request an expert from the C Chemistry Department of Malaysia, DW4, to examine the signatures of the deceased.

[35] In the chemist report by DW4, comparisons were made to the specimen of the deceased's signature with the documents submitted by the deceased's family. The plaintiff highlighted to this court that what was stated by DW4 in her chemist D reports carries no weight and does not assist the defendants' case in proving their defence of forgery, on which I have no qualm. The reason being: not only the defendants had admitted in their submission that the chemist reports was inconclusive, DW4 has herself testified during cross-examination that she could not form an opinion to ascertain authorship of the signature on the PA due to E insufficient and/or absence of contemporaneous specimen signatures provided to her.

...

[39] The plaintiff's case is that the SD and oral testimonies and confirmation given by PW1, PW2, PW4 and PW6 are clear to prove that the trust deed and PA are valid F and binding.

[40] The plaintiff further premised that the evidence of the plaintiff's witnesses, especially PW4 and PW6, is reliable and credible for they were professional, and their testimonies were consistent throughout the trial and further corroborated by contemporaneous documents produced by the plaintiff. Besides, they have no G reasons to lie to this court (see *Glove Kendall Limited & Anor v Maple Challenge Sdn Bhd & Ors and other suits* [2016] MLJU 1452; [2016] MLRHU 1488).

[41] I fully concur with the plaintiff on this point for few reasons. First, the testimonies of PW1, PW2, PW4 and PW6 that the signatures of the deceased in the trust deed and the PA were indeed placed by the deceased voluntarily and duly H witnessed by them were consistent throughout the trial and were duly corroborated.

[42] Secondly, their evidence also corroborated with documentary evidence produced by the plaintiff in this court ie, the SD affirmed by PW4.

[43] Next, the testimonies of PW1 and his assistant, PW2 were also supported and substantiated by the evidence of independent third parties, PW3, PW4 and PW6, I who are advocates and solicitors. I find the testimonies of all of them sound, solid, consistent, and not impeachable.

[44] In fact, DW1 had candidly testified that Norliza ('PW3') would not be benefitted by telling lies in court.

...

[47] The defendants relied on PW3's testimony during trial that the consent application form was submitted to Menteri Besar Office and her confirmation that all of the properties were leasehold properties to strengthen their suspicion that there is no need for the properties to be held on trust in favour of the plaintiff. The defendants then argues that if at all, the trust held by the deceased was against common sense. According to the defendants, based on the SPAs signed by the deceased, the transactions were all done with non-bumiputras. There is no evidence that the properties were bumiputra lots. Looking at the original MOTs at pp 1–16 in common bundle of documents, the transfer was done based on the initial SPA between PKNS and Kansas Corporation Sdn Bhd, then from Juru Bena Tenaga Sdn Bhd to the deceased. None of the companies are bumiputra companies. The defendants then produced ROC searches on Kansas Corporation Sdn Bhd and Juru Bena Tenaga Sdn Bhd (pp 7–17 and 18–23 of additional defendants' documents) to support their allegation. This is the basis of the defendants' argument that the plaintiff's claim that the properties were bumiputra lots was a mere conjecture to justify the reason the deceased was purportedly holding the properties on trust and on behalf of the plaintiff.

[48] Besides, the defendants added several reasons why the plaintiff cannot rely on the trust deed and the PA to prove his purported beneficial ownership of the properties, amongst others, the timing, and the irregularities of the wording of the trust deed. The defendants questioned the rationale for the trust deed to be created two years after the MOT.

[49] Unfortunately, none of these points were pleaded in the defence. Therefore, this court could not entertain them. Besides, as mentioned earlier, I echo the decision in *Ho Ju Hun* and *Cheu Kuok King* and see these arguments as misconceived.

[50] Further, the defendants had relied on the testimonies given by PW3 and PW5 to argue that the application to Menteri Besar's Office for the purposes of converting a bumiputra lot to non-bumiputra lot has yet to be fulfilled by the plaintiff to justify their accusation that the properties were bumiputra lots. With that, the defendants had come to their own conclusion that there is no logical explanation for the deceased to hold the properties on trust for the plaintiff.

[51] However, during trial, PW6 who is an advocate and solicitor who had overseen the transfer of the properties to the deceased and prepared the trust deed and the PA had confirmed that the properties were bumiputra lots.

...

[55] Based on the testimony given by PW6, it is pertinent to note that the plaintiff has established that the properties are bumiputra lots. Further, as explained by PW6, the fact that the properties are bumiputra lots, for the same to be transferred to non-bumiputra an application must be made at Lembaga Perumahan and the Selangor Land Office. The plaintiff has produced the documentary proof that the said application has been done by the deceased to effect the transfer of the properties to the purchasers, who are non-bumiputra.

[56] More importantly, the plaintiff has produced the letters of consent to transfer dated 8 June 2017 issued by the Land Office that the Land Office has given their consent for the properties to be transferred from the deceased to the purchasers and

these letters of consent to transfer is corroborated with the testimonies given by PW6 during trial (see NOP (Vol 2), p 96).

[57] Hence, the fact that the properties were all leasehold properties does not mean that they are not bumiputra lots. The allegation of the defendants that the properties were leasehold properties is completely irrelevant and it does not assist the defendants' accusation or to draw any doubt as to the need for the creation of the trust in our present case.

[58] I am also not convinced by the defendants' argument that the deceased was the owner of the properties on the purported basis that Juru Bena Tenaga Sdn Bhd has offset their debts owed to the deceased by transferring the properties to the deceased because the plaintiff's witnesses had testified otherwise.

...

[64] Consequently, it is unreasonable for the defendants to claim ownership of the properties by relying on the MOT but has failed to explain the transfer of the properties from Juru Bena Tenaga Sdn Bhd to deceased as stated in the MOT. The defendants had also failed to explain the existence of the trust deed and the PA.

[65] The plaintiff, on the other hand, had given his explanation as to the reason the properties were transferred to the deceased's name: because Juru Bena Tenaga Sdn Bhd did not want the properties. The plaintiff then decided to take up the properties and had decided to register them under the name of deceased for him to hold on trust for the plaintiff.

...

[77] The defendants also alleged that the trust deed is worthless and of no value to the plaintiff's case despite his effort in tendering five witnesses to testify on the existence of the trust deed during trial. This is because one obstacle remains in his way: the plaintiff has failed to prove that there were any valuable considerations in exchange for the creation of the trust.

[78] To refute, the plaintiff asserted that there was a clear admission of fact that the plaintiff had paid consideration for the creation of trust pursuant to the terms of the trust deed and the PA.

[79] Further, in view that parties are bound by four corners of the trust deed and the PA, there is no requirement for the plaintiff to prove the consideration that has been paid in exchange of the trust.

[80] The plaintiff relied on the judgment of *Ho Jo Hun* to support his contention that there is no need for him to show that valuable consideration has been made for the creation of the trust since the trust deed and the PA had clearly stipulated that consideration has been given.

[81] The terms of the trust deed and the PA had clearly stipulated that the deceased agreed that all consideration payable for the acquisition of the properties has been paid by the plaintiff. The relevant excerpt of the trust deed is reproduced here for the ease of reference:

> B. The Trustee agrees that all consideration payable for the acquisition of the Property has been paid by the Beneficial Owner.

[82] It is also pertinent to note that during the trial, the plaintiff testified that he was the one who had been servicing the bank loan for the properties and not the deceased.

[83] Having considered the facts and evidence produced, I find that the allegation of the defendants that there was no valuable consideration paid by plaintiff in exchanged of the creation of the trust and the PA was mere baseless assumption and was raised as an afterthought.

[84] The plaintiff also asserted that he had established that the 10% deposit of the properties had been duly paid to the plaintiff pursuant to the following evidence:

(a) Maybank Islamic cheque no. 016866 dated 23 January 2017 (p 146 of encl 48);

(b) CIMB Islamic Bank Berhad cheque no. 000669 dated 23 January 2017 (p 146 of encl 48); and

(c) statutory declaration affirmed by Norliza Binti Rashid (p 147 of encl 48).

[14] The appellants are dissatisfied with the judgment and has on 11 April 2023 lodged their appeal to the Court of Appeal.

FINDINGS OF THIS COURT

[15] It is trite that our appellate function is confined to a review. This principle was comprehensively explained by Zabariah Yusof FCJ in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC), where Her Ladyship stated as follows with emphasis added by us:

[71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:

(i) a material error of law;

(ii) a critical finding of fact which has no basis in the evidence;

(iii) demonstrable misunderstanding of relevant evidence; and

(iv) a demonstrable failure to consider relevant evidence,

(all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* effectively included them under what amount to the trial judge as being 'plainly wrong'.

[72] The phrase 'lack of judicial appreciation of evidence' used in *Gan Yook Chin* could very well encompass three out of four errors of a trial judge (other than the 'material error of law') said to be identifiable by Lord Reed in *Henderson*, namely:

(i) critical factual finding which has no basis in evidence;

(ii) demonstrable misunderstanding of relevant evidence; and

(iii) demonstrable failure to consider relevant evidence.

[73] Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of 'material error of law' listed by Lord Reed in *Henderson* can occur when a trial judge erroneously apply legal principles (eg rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions (eg, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.

[74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.

[75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v Paras Nath Singh* [1976] 1 MLJ 151; [1965] CLJU 30; [1965] 1 LNS 30, when it held:

> The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87 and [1965] 2 MLJ 151 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:
>
> > Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.
> >
> > This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.

[77] It is to be observed that this court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* had referred to *McGraddie* and *Henderson* and has adopted the *Henderson* approach of the 'plainly wrong' test in determining whether the trial court's findings of fact is reversible upon appeal:

> Recently in *Henderson v Foxworth Investments Ltd and Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some

other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.

...

[148] Given the aforesaid, *we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts*.

See also *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA).

[16] Upon our review, the trial, and hence the appeal before us, primarily centred on whether a trust was created in respect of the properties, wherein the deceased was the trustee and the respondent the beneficiary. The respondent contended that he had, in 2009, purchased the properties with his own funds but had caused them to be registered in the name of the deceased.

[17] The learned High Court judge found in favour of the respondent and held that a trust had indeed been created.

[18] This is essentially a mixed question of fact and law, one which is largely dependent upon the evidence adduced by the parties.

[19] The respondent sought to establish the existence of the trust by relying on a deed of trust and a power of attorney, both dated 15 November 2020 ('trust documentation').

[20] At trial, the appellants challenged the admissibility of the trust documentation and further argued that the trust was unenforceable, as no valuable consideration had been furnished by the respondent in acquiring the properties.

[21] In respect of admissibility, we are satisfied that the learned High Court judge was correct in admitting the trust documentation into evidence, relying on ss 31(1)(g) and 65 of the Evidence Act 1950 ('the EA'). In our view, the trust documentation could, alternatively, also have been admitted under s 73A of the EA.

[22] As to the evidential weight of the trust documentation, the learned High Court judge rightly relied on the testimony of the respondent's witnesses, particularly the solicitor who attested to the signatures. It is trite that an appellate court will defer to the trial judge's factual findings, given the trial judge's unique advantage in seeing and hearing the witnesses when assessing their credibility: see *Hoo Ah Tee v Public Prosecutor* [2013] 4 MLJ 636; [2013] 3 AMR 649 (CA).

[23] On the issue of valuable consideration, the learned High Court judge found that the purchase price of the properties had been wholly paid by the respondent. This was expressly recorded in the trust documentation and corroborated by the respondent's testimony as well as documentary evidence, including proof that the 10% deposits for three of the properties were paid directly to him. We see no reason to disturb this finding. In any event, what is determinative is the presence of the three certainties in trust law which are certainty of words, certainty of subject, and certainty of object. Once these are established, an express trust is valid regardless of whether valuable consideration is furnished: see *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 1 MLRA 226 (SC).

[24] We are nonetheless mindful that the appellants contended that the trust has not been registered pursuant to s 344 of the National Land Code ('the NLC') which provides:

> 344 Registration as trustee or trustees, and deposit of trust document
>
> (1) Where, by any instrument of dealing or order of the Court or land Administrator, any alienated land or share or interest therein is transferred or transmitted to, vested in or created in favour of any person or body 'as trustee', or two or more persons or bodies 'as trustees', the Registrar shall so describe him, it or them in the memorial of registration.

(2) The proprietor or co-proprietors of any alienated land, and any person or body in whom any share or interest in alienated land is for the time being vested, may apply to the Registrar to be registered in respect of that land, share or interest 'as trustee' or, as the case may be, 'as trustees'; and the Registrar shall give effect to any such application by making the appropriate addition to, or amendment of, the existing memorial of registration.

(3) Where the words 'as trustee' or 'as trustees' have been included in any memorial of registration pursuant to subsection (1) or (2), or the corresponding provisions of any previous land law, any instrument declaring the trusts to which the land, share or interest is subject may, upon payment of the prescribed fee, be deposited with the Registrar for safe custody and reference; and no instrument of dealing shall be unfit for registration by reason only of the fact that it refers to any instrument so deposited.

(4) Subsections (1) and (2) shall have effect subject to the Trustee Act 1949 [Act 208] (which inter alia provides that, except in the case of any immovable property vested in trustees for charitable, religious or public purposes, the number of trustees of any immovable property shall not exceed four).

Although we noted that the foregoing defence of non-registration was not pleaded in the appellants' pleadings, we are nonetheless of the view that it is not mandatory on the deceased or the respondent to register the trust pursuant to s 344(2) of the NLC. It is because the dominant purpose of s 344 of the NLC is to ensure that the interest of third parties involved in land dealings are protected when the land is subject to trust. There is no challenge made by third parties on the properties here but merely a monetary claim made by the respondent on the sale of three of the properties based entirely on the relationship between the deceased and him only as governed by the trust documentation.

[25] In the premises, we find there is an express trust that exists between the respondent and the deceased in terms of the trust documentation at all material times. There is hence no plain error committed by the learned High Court judge in any way that justified appellate intervention.

[26] The appellants, however, further contended that the trust was illegal, as the subject properties were Bumiputra lots and the respondent, being a non-Malay, could not have a beneficial interest therein.

[27] We note that this issue was not specifically pleaded, though reference was made to the Bumiputra status of the properties during trial. It is nonetheless trite that illegality may be raised at any stage of the proceedings, including on appeal: see *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 MLRA 53 (PC) and *Asia Capital Commodities Trade Sdn Bhd v The Owner of the Vessel 'Oriental Dragon'* [2025] MLJU 2793; [2025] MLRAU 272 (CA).

[28] As such, we will address this issue. It is noteworthy and somewhat surprising that, in the High Court's grounds of judgment, the appellants contended that the properties were merely leasehold properties, whereas it was the respondent who asserted that the properties are Bumiputra lots, essentially to justify the creation of the trust.

[29] In *Chia Siew Hock v Chia Seow Gim & Anor* [2021] 5 MLJ 51 (CA), it was held that the transfer of a Bumiputra lot to a non-Bumiputra is contrary to public policy and may also be illegal. In delivering the judgment, Umi Kalthum Abdul Majid JCA stated as follows with emphasis added by us:

> [62] *There was also an important finding regarding Lot 5065, the bumiputra lot, which was part of the joint venture land. The LHCJ held that it was against public policy and possibly, also illegal, for this particular lot to be transferred to a non-bumiputra. We have not been shown by the appellant to our satisfaction that this is an erroneous view*. Furthermore, Lot 5065 did not belong to the defendants. Hence, it did not make sense for them to have agreed or promised to give the same to the plaintiff pursuant to the agreement as spelt out in the purported resolution. This is another reason why the LHCJ found the resolution to be null and void and of no legal effect. Based on the factors that LHCJ had alluded to and the overall evidence cumulatively, she cannot be faulted for having come to this firm conclusion.

See also *Tuan Syed Azahari bin Noh Shahabudin & Anor v Ming Holdings (M) Sdn Bhd* [2007] 4 MLJ 333.

[30] That said, the burden lies on the appellants to demonstrate, first, that the properties are in fact Malay reservation land under the Malay Reservations Enactment (FMS Cap 142) ('the Enactment'), and second, that the Enactment expressly prohibits or restricts such dealings with non-Bumiputras. This issue was discussed in *Ooi Poh Ean & Anor v Lembaga Pembangunan Langkawi* [2018] 2 MLJ 760; [2018] 1 MLRA 218 (CA), where Umi Kalthum Abdul Majid JCA explained with emphasis added by us:

> [18] With regard to the status of the lands/properties, it was submitted for the second and third defendants/appellants that based on the Geran Mukim in P28 (in respect of Lot 3524) and P29 (in respect of Lot 3525), it was wrong for the learned JC to have held that the status of the said Lands as Malay Reserve lands since it had been clearly endorsed on the Geran as follows:
>
> > Tanah yang diperihalkan di atas adalah dipegang untuk selama-lamanya oleh tuan punya pada masa namanya disebut dalam rekod ketuanpunyaan di bawah, tertakluk kepada peruntukan-peruntukan Kanun Tanah Negara, kepada kategori yang dinyatakan di atas dan kepada syarat-syarat nyata dan sekatan-sekatan kepentingan yang dinyatakan di bawah, sebagai balasan bagi pembayaran cukai tahunan yang sewajarnya.
>
> That is to say that the status of the said lands is as freehold lands, notwithstanding the fact that it was not disputed that the land titles had been endorsed

'Pengisytiharan Rezab Melayu'. That endorsement was merely for office purposes. The 'free hold' status was further reflected in the private searches P14 and P16.

[19] The learned counsel for the second and third defendants referred to the definition of 'Reservation Land' in the Enactment as follows:

> 'Reservation Land' means land situate within an area which has under the provisions of s 3 or s 4 been declared to be, or to be included in a Malay Reservation, such declaration not having been revoked.

Section 6 of the Enactment was also referred to as follows:

> 6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a charge or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

[20] It was the defendants' submission that the said s 6 does not apply to the Lands as s 6 prohibits the dealing of land which is a Malay Reserve land and held by a Malay to any other person who is not a Malay. However, the Lands in issue are lands which had been declared as Malay Reservation land but held by a non-Malay, that is, the first and second defendants. Therefore, s 6 of the Enactment does not apply to the lands. Moreover, there were no evidence to support the plaintiff's contention that Lot 3524 and Lot 3525 were held by a Malay prior to the declaration of the lands to be Malay Reservation lands. Instead, it was proven vide P22 that the lands were purchased by the first defendant from the developer Landrise Development Sdn Bhd, which had not been proven to have been declared a 'Malay' under the Enactment.

[21] It was further submitted that as there were no issue raised regarding the transfers of the lands from Landrise Development Sdn Bhd to the first defendant and the fact that the said transfers were allowed by the Land Administrator, proved beyond doubt that the transfers were legal and that the first defendant had obtained good titles over the lands and its titles are indefeasible. Since its titles over the lands are indefeasible, the first defendant had the right to transfer the lands to the second and third defendants as bona fide purchasers for consideration and they have indefeasible titles to the Lands respectively. The learned counsel cited the case of *Syarikat Macey Berhad v Nightingale Allied Services & Ors* [1995] 2 MLJ 411; [1994] 3 MLRH 890; [1995] 1 CLJ 890; [1995] 1 AMR 656 as being an authority for his submission based on similar provisions of s 8 of the Malay Reservations Enactment FMS Cap 142 to s 6 of the Enactment.

[22] *We agreed with the submission of the learned counsel for the second and third defendants insofar as it related to the non-applicability of s 6 of the Enactment to the lands. Section 6 of the Enactment provides very clearly that it applies in a situation (for the purposes of this appeal) 'where any Reservation land is held under a document of title*

by a Malay ...'. Since the lands were registered in the first defendant's name, who had not been declared to be a Malay pursuant to s 19 of the Enactment, we concluded that the plaintiff's reliance on s 6 of the Enactment to invalidate the Lands' transactions was misconceived.

See also *Bebe Sakimah bt Mohd Asrof v Pendaftar Hakmilik Negeri Perak* [2021] 7 MLJ 701; [2021] MLRH 700.

[31] On the evidential record before us, we are however unable to conclude that the dealing in the properties contravened the Enactment. In other words, the appellants had not adduced sufficient cogent evidence, both documentary and testamentary that the properties were indeed Malay reserved land. Accordingly, the appellants' contention that the trust was illegal and void as against public policy cannot be sustained.

CONCLUSION

[32] For the foregoing reasons, we unanimously find that there is no appealable error which warrants appellate intervention by us.

[33] The appeal is hence dismissed and the judgment of the High Court is affirmed. The appellants shall pay costs of RM25,000 to the respondent subject to allocator.

Appeal dismissed; and High Court's decision affirmed.

Reported by Ashok Kumar